the judges, and you put in a request that you want a specific judge, a specific year, and a specific rule of procedure, mentioning a specific word. It can go through that database and give you the results in seconds. And that's what CMVC is.

Now, Ms. Thomas said -- her declarations are based on what we call a bottom up approach, which is, we're going to look at every file in the database on AIX. And first we're going to identify every file, we're going to look at every file, and we're going to extract what the system tells us is AIX. And then we're actually going to look at what we extracted to make sure the system is correct, that it really is AIX. Even though it came out as an AIX file, we don't believe that. We're going to check that out. And then you go and you copy it.

And she says that work of extracting it is going to take several weeks. My guess is if you extract it, it's going to take a day or two, and what's going to take the rest of the several weeks is the unnecessary task of double-checking the AIX files to make sure that the system is correct. But her affidavit doesn't explain that. She doesn't list time. It's just these huge estimates.

But she says that the top down approach, which makes use of the hierarchical structure, which is what we suggested which is how a programmer would do it, doesn't work because AIX is not hierarchical.

Well, I beg to differ. That's from their own manual. That's a hierarchical structure. Folders, subfolders, files, subfiles.

We have another document. There are two other documents, Your Honor, that IBM marked as confidential. One is the overview of AIX source control. That was attached to the Sontag declaration, and it was attached to it. The other one is the overview -- I'm sorry -- another document called SCO, CMVC and code drop procedures. And that was Exhibit A to the August 19th declaration of Jeremy Evans. Both of those documents confirm the hierarchical structure.

Indeed, IBM says, Joan Thomas says, well, even though all of the AIX files are on one server, they're commingled with hundreds of other products, hundreds of other products, and you have to separate them out. Sort of as though trying to imply that it's a very difficult job, and it's hard to separate it out.

IBM touts itself as the largest information technology company in the world. They have touted this system as having incredible capabilities. And they would not have put hundreds of other product, source code from other hundreds of products into CMVC if they couldn't separate it out quickly.

THE COURT: Mr. Frei, I'm going to limit you to five minutes.

MR. FREI: Okay.

How do you extract files? Specify a file location or identity or identify release. These are two ways. There are many others.

How does CMVC track the changes? That explains in very detail about changes to documents, changes to source code, fixing bugs, improving it. It says that the users can query the history. Identify the contents. The reason why it changed over time. Perhaps they changed over time to make it more Unix-like. They can get the details of the defects and features. That's an awful lot of information that is available on this system.

I pointed out this release extraction. That is one way of obtaining information. The test window was another way. The features window is another way. There are loads of other ways all outlined in the manual, all designed to make this thing very, very, very, very searchable.

Now, all of the AIX is on one server. It's accessible all over the country in many geographical locations. We could get remote access. If there is a burden, we could easily get remote access and do it ourselves. In fact, we would rather do that. We would rather search that system ourselves for AIX than have to rely on IBM.

Basically, if you read Joan Thomas' declarations literally, what you come up with, I submit, is that no

company, especially not IBM, would tolerate a configuration management or version control system that was as difficult to use as Joan Thomas says. It just doesn't make -- it doesn't make sense.

She also says -- she attacked our discovery on two grounds of burden. One was the hierarchical structure that I went through, and that's just incorrect. She's inconsistent with her own documents, and the system wouldn't even work. The other way she attacked it, she said, okay, after we get all this information, we then have to produce it. And it's going to take weeks and weeks to produce it.

Well, that's not -- that's not correct. Once they get that information assembled in the database, it's just burned onto CDs at an hour a piece. Our affidavits -- or our declarations show that it is probably a one-day task to put all that information onto a DVD for us. But again, we'd like to have the remote access ourselves.

Throughout her declaration, she talks about 40 million pages of paper and the source codes equivalent to 10 million pages of paper. That may be true. But what she's not saying is that this stuff is electronically stored. We don't want much paper. We would rather have the electronically stored information. And they can provide it to us without much of a burden. Even if there is several weeks worth of burden, in a case like this of this importance, if

you apply Rule 27, it is not an undue burden whatsoever.

Now, we need this information so badly because you can have copyright infringement of software without copying a single line of source code. And the cases are clear on that. No source code is copied. But if you copy the sequence, the structure, the organization, the algorithms, the data flow, that can be -- that's protectable, and that can constitute copyright infringement. No software comparison tool picks that up. This is what you read between the lines when skilled individuals analyze the code. And they analyze it, and they determine how it's working. Software tools don't do that. Just like you couldn't get the plot of a book out of a software tool. You've got to read the book, and you have to understand it.

And we need the information in there to target and focus this. What modules do we look at? You've got 8750 files, for example, in Linux and, you know, about the same thing in AIX. And those files contain from tens of lines to tens of thousands of line. We need to have the database to know where to look.

Your Honor, that's it.

THE COURT: I understand. Thank you, Mr. Frei.

Mr. Eskovitz, do you want to take your --

MR. HATCH: I believe I can do it in five minutes, thank you.

THE COURT: Five minutes. And that will give Mr. Marriott his time, and we'll have limited rebuttal.

MR. ESKOVITZ: I appreciate your indulgence, Your Honor. We obviously have a lot to say, as our papers probably foretold.

THE COURT: Sure.

MR. ESKOVITZ: As I mentioned before, there's the second submission in front of the Court, and it relates to the Court's last March 3rd order. And our renewed motion to compel relates to two provisions of the Court's last order with which IBM has not complied. The first relates to the Court's direction that they supplement their response on contributor information, programmer contributor information; and the second relates to Linux documents on the high level executives. I'll take the first one first.

This is what our original interrogatory asked for, and this is what they originally said. We asked them to specify who contributed code to AIX, Dynix, and Linux, and to identify the contributions.

What they originally did was they gave us lists of 7200-plus names, and they said, these are people who may have access or may have had access to AIX or Dynix or may have made contributions to Linux. That was plainly deficient. It plainly didn't give us what we were looking for, and so we moved the Court to compel last November a response to -- a

supplemental or full response to our interrogatory.

This is what we said. We said, we can't -- they haven't told us what files have been contributed. It's not responsive to the most important part of our interrogatory, and as such, it's nearly useless to us as a starting point for further discovery. Who are we supposed to depose when they give us a list of 7200 names? We have 40 depositions in this case. We can't take 7200 depositions, nor would anybody want us to.

The next board, this is what we said about the Court's argument. It's just reiterating the same thing in February. They are required to identify the contributor information. We have no idea who to weigh, who we're supposed to be paying attention to.

So the Court ordered IBM to supplement their interrogatory response to Interrogatory Number 5, and this is what IBM did. First, in response to our interrogatory, they listed the same 7,000-plus names. And they said that they believed that the people who had access include the people who made contributions, so within that 7200 names they're somewhere in there.

Even more importantly, they didn't give us any of the contribution information that was, as we explained, the most important part of the interrogatory. Rather, they said, to the extent readily determinable, now that was not part of

the Court's order, but that's a new thing that IBM added. They told us, we can get Linux contributions from the public record, and we can get IBM contributions to -- with respect to AIX and Dynix, we can get it from the products themselves.

Well, it turns out that's just not true. We can't get program information from AIX. It doesn't include any programmer or contribution information.

And with respect to Dynix, there is a limited amount of information. It has nicknames often, or it has abstract to the contribution. But importantly, it doesn't identify the code which was contributed, and it doesn't identify the code that the newly contributed code was replacing. This is kind of taken separately. This is a separate document. It is not associated with the code, and it doesn't tell you the precise program of contribution, which is what the interrogatory requested.

With respect to Linux, it's true that you can get some information publicly available, but it's obviously not going to be as thorough as IBM's only information about what they contributed to Linux. We tried. We found about a million-plus lines that IBM contributed to Linux from the public information, but there's huge deficiencies in terms of our practical ability to ascertain that information. The publicly available information is on hundreds of websites disbursed. There's not one single place where it's available.

It frequently uses programmers names, handles, like you saw REM on the Dynix thing. It's the same thing. They use nicknames. It doesn't tell you who it did. And for the more than 1 million lines of patches, if you go to the IBM that they acknowledge, patches that they contributed to Linux, it certainly doesn't attribute it to any anybody or any IBM programmer. It attributes some contributions to groups, open source groups that IBM is a member of. And some of it, it doesn't attribute it, like I said, to anybody.

So we are asking the Court to re-order, to compel IBM to comply with this. This is the same programmer information that is so critically relevant. It's a subset, and the Court ordered it produced, and IBM did not produce it. And here's what IBM had to say about its noncompliance.

After we pointed out it's not true, you can't get this information from the sources that you say are available to us, they say, our response, they underline, "to the extent readily determinable" in their supplemental response, and they say, IBM's response is not misleading. That's the best they can say about it. And they say, it is best undertaken in the first instance, by reviewing -- this project is best undertaken in the first instance, by reviewing the source code for AIX and Dynix for authorship information.

Well, however that is to justify their noncompliance, it's still not true. You can't get that

information from AIX and Dynix. So I don't know what they mean by best undertaken in the first instance because they have no basis for making that statement.

So now they tell the Court that they always understood this order to be about contact information when, in fact, what SCO had said and what the Court had ordered and what IBM had even purported to do with respect to contributions, they say, that's not what SCO's principal complaint was. And we understood the Court's order to be directing IBM to provide contact information. Well, that's obviously inconsistent with everything you've seen about the history of this issue. But it's also inconsistent with the Court's order because, as the Court is aware, in Paragraph 6, the Court specifically ordered separately, apart from the contribution information the production of contact information.

And finally, just briefly, with respect to the other issue on Linux documents. This is what the Court ordered them to do, produce highly -- high-level documents from your Linux. Relating to Linux, this is what IBM has said. They said, they've -- we've given you everything we have from our senior executives and our board of directors.

And we brought this to the Court's attention because it just doesn't seem possible that they fully complied. And these are a list of some of the deficiencies on

that production. With respect Paul Palmisano, the chairman and CEO, they haven't produced a single e-mail or correspondence discussing Linux, even though he was the person who's been computed to be the major force behind the Linux shift.

With respect to -- even more dramatically with respect to their self-proclaimed Linux Czar, they haven't produced a single document, not one document in their entire production, with respect to the Linux Czar. And with respect to the board minutes, board documents, they gave us one single power point presentation. We don't have any of the board's consideration of Linux. And it's just hard to imagine a company of this size and this sophistication considering a billion, multi-billion dollar investment in Linux doesn't have more high-level documents from its executives and board related to Linux.

Thank you for your indulgence, Your Honor.

THE COURT: Thank you.

Mr. Marriott, do you want to go forward, or do you want to take a short break?

MR. MARRIOTT: It's up to Your Honor.

THE COURT: Let's go.

MR. MARRIOTT: Good morning, Your Honor. In the few minutes that I have, if I may, Your Honor, I would like to explain why it is that the criticism is directed at IBM's

compliance with the Court's order and IBM's responses to SCO's discovery requests is misplaced and why it is that the discovery that SCO seeks ought not to be allowed.

Your Honor, despite the number and the length of the memoranda submitted in support of SCO's discovery requests, there are, in fact, very few issues presented by these papers. I count the pages -- we count the pages of those memoranda at 227, Your Honor, and that does not include the documents provided to us for the first time today, which include new arguments and new information. And that doesn't include the expert testimony effectively offered here by counsel today as to the content of the CMVC system.

Nevertheless, Your Honor, notwithstanding the length of those memoranda, there really are essentially only three categories of discovery which SCO contends that it ought to have received, but that IBM has failed somehow to properly provide. Let me take, if I may, each of those in turn.

The first, Your Honor, is SCO's request for contact information with respect to certain third parties. The second is SCO's request for documents from the files of certain IBM executives. And the third is SCO's request for roughly 2-plus billion lines of additional source code relating to AIX and to Dynix, two IBM operating systems.

First with respect to the contact information, Your Honor. Your Honor asked IBM to provide SCO with contact

information for certain individuals, and we did that. The dispute that is presently before the Court concerns contact information with respect to certain third parties. SCO sent us a letter requesting that we provide contact information with respect to certain third parties including the former general counsel of the SCO Group, including the former chief technology officer of the SCO Group, including the former -- the founder of the company and its former CEO.

It also asked that we provide contact information, not with expect to individuals whose contact information might be just in the files of IBM, but -- bless you -- but instead with respect to contact information that counsel at Snell & Wilmer where perhaps in their preparation of their case found. We said to SCO what we thought were obvious reasons, we didn't believe we were required to provide this information. We said, however, that we were willing to do it so long as it occurred on a reciprocal basis.

What SCO said in response, Your Honor -- what SCO did in response, rather, is that the day before its opposition was due to IBM's motion for summary judgment, it filed a motion to compel with Your Honor, the motions to compel that we've heard today, which it then turned around and argued in front of Judge Kimball were sufficient in and of themselves to preclude the entry of summary judgment because they had a pending position to compel. They cited some cases which they

construed to sort of represent the principles of those motions to compel. Be it pending, the Court couldn't possibly grant IBM summary judgment.

Your Honor, we think this particular request is, frankly, silly. And in our opposition papers, we got out the phone book, and we got on the Internet, and we found the contact information from the individuals in question, and we gave it to them, I think mooting the request. And we ask only that if the rule is going to be that counsel does one another's homework for another, then we ought to reciprocally have them provide to us the contact information for third parties who they may have discovered contact information. That's the first of the three categories, Your Honor, that's at issue on this motion.

The second one concerns documents from the files of certain IBM executives. Here again, Your Honor, IBM did not from the beginning withhold documents from the file of the executives. Your Honor asked us to provide documents from the files of executives. We undertook a reasonable search for those documents, and to the extent we found responses, non-privileged documents, we provided them.

It shouldn't be any huge surprise to SCO that not all executives have enormous volumes of documents in their files. We asked for e-mails sent by Mr. McBride, the CEO of SCO, and in response we were told, quote, that he infrequently

sends e-mails, close quotes. So, therefore, we don't have many e-mails.

Your Honor, we undertook a search. We produced what we found. We can't produce what we don't find.

THE COURT: Mr. Marriott, have you prepared a privileged log?

MR. MARRIOTT: Your Honor, we are, as I believe SCO is, preparing privilege logs. And we have not yet, the parties, exchanged those logs, and I think we ought to set a day for that. We prepared it, but the parties have not exchanged privilege logs.

IBM has produced thousands of files and documents from the files of its executives. And from Mr. Palmisano's files, we produced more than a thousand pages of papers. We can't produce what we don't find. That's the second category of discovery that they want.

Now, the third category concerns the two or so-plus billion lines of code and the other related information that SCO says it must critically have for presentation of this case. Parenthetically, Your Honor, it sounds an awful like listening to counsel, they don't need any discovery. It sounds to me that the case is proved, and the door's been opened and now the door has now been shut. The only thing, Your Honor, really at issue on this motion is whether IBM should be required to produce now 2-plus billion lines of

additional source code relating to its AIX and Dynix product.

A little background. IBM has produced, as counsel for SCO acknowledges, the AIX and the Dynix releases of that source code during the period from roughly 1999 to 2004. That's the period of SCO's original request. It's the only period that could conceivably relate to the allegations of their underlying claims. That's been produced.

Counsel, in the book given to us in morning, included a chart which shows in black presumably what they believe and agree we have produced and in red what we haven't produced. We told SCO long ago, Your Honor, that we've looked for this AIX Power 5.0 product, which was a beta release, and we haven't been able to find it, and, therefore, we haven't been able to produce it. And counsel knows that.

THE COURT: Are you prepared to submit affidavits in support of those arguments --

MR. MARRIOTT: Yes, Your Honor.

THE COURT: -- these arguments related to your search of the executives files, as well as the alleged missing source code?

MR. MARRIOTT: Yes, Your Honor. We're happy to -- with respect to Mr. Wladawsky-Berger and Mr. Palmisano, we're happy to look again for documents. We will, and we found nothing. We'll look again, and we will provide you and counsel, if you wish, with an affidavit describing the efforts

we've undertaken to find those documents. And parenthetically, it would be nice, Your Honor, if the same were true with respect to SCO's production.

THE COURT: I understand.

MR. MARRIOTT: If the parties are going exchange affidavits, that's fine. We think it ought to go both ways.

So we have produced, Your Honor, we have produced substantial source code relating to the AIX and Dynix products from that period of '99 to 2004. That code amounts to somewhere in the order of 900 million lines of source code, which is roughly equivalent, if you were to print it to paper, about 50 million pages of paper.

THE COURT: Is that what's sitting in front of Mr. Shaughnessy?

MR. MARRIOTT: That is not, Your Honor. But we'll come to those papers momentarily.

Now, according to SCO, Your Honor, the code we have produced, the 900 million lines of code isn't enough. They've got to have more. Despite the fact, frankly, that very little has happened with the code that they have received. They have not taken a single deposition of an IBM person. They've only recently noticed three depositions of IBM individuals.

There are at least, Your Honor, five reasons, I respectfully submit, why the Court ought not to grant this request that IBM provide 2-plus billion additional lines of

code and millions and millions of additional pages of hard copy documents from files of IBM programs.

First of all, Your Honor, Your Honor previously denied SCO's request for essentially this same information. And SCO has done nothing, we submit, to justify a change or reconsideration of the Court's order. We advised Your Honor when we were here previously that we didn't believe we had any AIX and Dynix with respect to the claims that are at issue in this case, but that in an effort to avoid a discovery fight, we would produce that had code which we have produced from 1999 to 2004, the 900 million lines of code, and we did that.

THE COURT: What about your counterclaim?

MR. MARRIOTT: We don't believe, Your Honor, and I will come to this shortly --

THE COURT: Address it as you go.

MR. MARRIOTT: -- that that code bears any relationship to the essential elements of those claims, to the defenses that relate to those claims.

Now, Your Honor, we provided this code. They asked for more. Your Honor said no. Your Honor said what IBM had indicated that it would voluntarily produce was sufficient. And you said, also, I think not surprisingly, that after you have identified that code, which you contend was improperly used by IBM or improperly contributed by IBM to Linux, that I'll reconsider your request in light of your disclosures.

And now, Your Honor, what SCO says is, well, we have produced some code. We have produce some information to IBM. We've identified with some specificity information which we say IBM misappropriated. And that, therefore, they say, is reason for the Court simply to open up the flood gates and to give them all of the AIX code and Dynix code known to man. All the AIX and Dynix code written in the last 20 years by thousands of developers over a very -- in different locations.

What we understood Your Honor to say in her ruling with respect to SCO's original motion to compel was that SCO would be required to identify that code which SCO contends IBM misappropriated. And that when SCO had identified that code, the Court would in view of that disclosure consider requiring IBM to produce additional code, to produce the drafts, the iterations, which is the development history, as they call it, that relates to that particular code.

What instead, Your Honor, SCO now seeks is not disclosures relating only to the code identified by SCO as supposedly misappropriated or supposedly infringed, but instead all AIX code and all Dynix code. In other words, the principle that SCO must first identify that code which has allegedly been misappropriated before IBM is required to provide specific discovery as to that code is out the window. They asked for it all again just as they asked for it before. And for the same reasons, Your Honor, and I'll come to them as

to the particular claims, that Your Honor denied the request and Your Honor ought to deny the request now, nothing has changed except that they have now asked again for everything.

The second reason, Your Honor, why the additional 2-or-so-plus billion lines of code ought not be provided is that it simply isn't necessary and isn't relevant to the claims in the case. SCO says, Your Honor, that this code is relevant to three claims. They say it's relevant to IBM's counterclaim seeking a declaration of non-infringement with respect to IBM's Linux activity; they say it's relevant to their claims for breach of contract; and finally, they say it's relevant to IBM's Ninth Counterclaim.

We have moved, as counsel and Your Honor discussed, Your Honor, for summary judgment with respect to two of those categories of claims, SCO's contract claims and IBM claim seeking declaration of non-infringement with respect to Linux. And we also separately moved for summary judgment on our claim seeking -- claiming copyright infringement as to SCO. Let me take each of those claims in turn.

First, Your Honor, there's IBM's claim seeking a declaration of non-infringement with respect to IBM's Linux activities. SCO says that IBM's Linux activities infringe SCO's alleged copyrights, and we disagree. Whether IBM's Linux activities infringe SCO's alleged copyrights depends under the controlling case law on a comparison between on the

one hand Linux, that which is supposedly infringing; and on the other hand, Unix, that which is supposedly infringed. SCO was founded in 1994 as a Linux company. We all have access to Linux. It's available with anyone with an Internet connection.

They have the Unix code, Your Honor, the other element necessary for this comparison, because they are the purported owner of the copyright. The only information necessary to determine whether Linux infringes Unix is Linux and Unix. That's it.

Now, counsel suggests that what is necessary here and suggested in the footnotes in the briefs before Your Honor, and it was suggested in court in argument in front of Judge Kimball, what they need is a road map. And that without a road map, they're forever lost and will never be able to find the connection between Linux and Unix. In fact, the analogy was used, Your Honor, that if a person were to go from Aurora, New York, I think it was, to Los Angeles, they would surely need a map. And similarly, too, if a person wishes to connect up between Linux and Unix, truly you would have to have a map.

Well, Your Honor, the map is Unix and it's Linux. It's not AIX and Dynix, neither the allegedly infringed product or the allegedly infringing product. As we told Judge Kimball, Your Honor, the notion that they need AIX and Dynix

to show infringement between Unix and Linux is like asking for a map of China. They might as well be talking about a map of an entirely different country.

But it's actually worse than that, Your Honor. The request is I think more disingenuous than that, and that's because we have given them a map. We have given them 900 million lines of code.

Now what they're telling you is, they just don't need a map, Your Honor, what they need is every iteration and draft of that map over a period of 20 years. So they don't just want the map what effectively is a map of China, but they want to know what drafts the map went through, what road did or didn't exist 15, 20 years ago. That is entirely irrelevant to this claim, Your Honor.

The second claim to which they say this discovery relates is their contract claims. And we heard -- we've heard a lot about the contract claims, Your Honor. And I'm not going to -- I'm not going to argue our contract case now. We've made a motion for summary judgment. We think those claims should be dismissed and adjudicated as a matter of law.

But let me just say this briefly about them. I think there is no dispute, and you heard it again today from counsel, that the nature of the contract claim is very simple. We took Unix on the one hand, their allegedly proprietary secret code, and we dumped it into the Linux operating system.

That is a public contact. We did it, they say, and it is out there, and it is compromising rights. The evidence of that alleged breach, Your Honor, if there is any such evidence, and they have yet to produce any in a year and a half of litigation notwithstanding two orders of this Court, if there is any, it is a matter of public record.

Consider, Your Honor, if you would, this chart, which you may recall. Do we have copies? You can perhaps see is from here, Your Honor. It was provided to the Court, and it's counsel's chart, so I assume they're familiar with it.

THE COURT: I remember it.

MR. MARRIOTT: May I approach?

THE COURT: And I can sort of see it. Sure.

MR. MARRIOTT: Okay. And counsel has been provided a copy.

This chart was presented at the last discovery hearing before Your Honor. And the point I take of this chart is to show that in effect IBM and Sequent, which was at some point acquired by IBM, had been bad corporate citizens, and they breached SCO's -- they breached their contractual obligations to SCO, whereas by contrast according to SCO, hp and Sun, who have similar agreements to the IBM agreement, have not breached their contractual obligations. And this is meant to show how IBM is different.

Well, Your Honor, SCO was able to reach this

conclusion with I'm sure all diligence to its obligations to its shareholders to publicly disclose no infringement, no breach of contract by hp, and none by Sun and not by Solaris without a single line of code. Not one.

We are not saying, Your Honor, that they can have no code relating to AIX and Dynix. We've given them, after all, the 900 million lines of code. We're saying they don't need -- in order to figure out whether IBM has breached contracts what effectively amounts to a public breach, they don't need billions of additional lines of drafts. It cannot possibly be that they need no code as to hp and no code as to Sun and 2-plus billion lines of draft code from IBM. It doesn't make sense, Your Honor. And we respectfully submit that it is further indication that this discovery is not in any way necessary to prove a claim for a public breach of contract.

Now, the final claim about which SCO makes so much, Your Honor, concerns IBM's Ninth Counterclaim. This counterclaim, this counterclaim is I think quite straight-forward. And it is, I think, frankly, in recognition of the problems that SCO has with respect to the relevance of this discovery to the other claims that it makes an issue of the Ninth Counterclaim, which we heard about, by the way, for the first time in their supplemental memoranda.

The Ninth Counterclaim, Your Honor, was

straight-forward. SCO said at the outset of the case, IBM, you have breached our contracts. You breached them, and therefore, we're terminating your rights. We're terminating your right to use the Unix System V software in your product. And so they say, you may no longer continue to distribute your AIX product because we've terminated your license.

And we don't think that's right, but indulge for a moment the argument that we somehow improperly breached the agreement, and therefore they can terminate our rights. We brought a claim that said, we don't think that's right, and we want a declaration that our continuing distribution of the AIX operating system isn't an infringement of your alleged copyright. That's what the claim was about.

Now, I drafted the claim, Your Honor. I did not for a moment contemplate the construction that they place on the claim now to make it sweep as broadly as they sweep. That isn't what was intended. That isn't what we intend to pursue, and we are perfectly happy to stipulate. If SCO drafts the stipulation, we are perfectly happy to stipulate, Your Honor, that that claim doesn't even remotely, remotely cover that which they say it covers.

The discovery there, Your Honor, is no different and no more relevant than the discovery that it relates to the other claims, because the claim simply isn't what they contend it to be, and there's no sense in the parties litigating

unintended claims. And if they want to draft a stipulation, I'm sure we can arrange to narrow that claim along the lines of that which we believe the claim is about.

I had said there were five reasons, Your Honor. The third reason why the information they seek ought not be provided is because it imposes an undue burden. I would have thought that this would require much more than a statement. They have asked for the production of 2-plus billion lines of source code, and they don't stop there. They don't stop there. What they say is we should also have to go to the files of the thousands of people who have had access to AIX and Dynix and Linux over the years, and we should have to actually collect from their files the hard copy documents which those individuals may have. So it isn't enough to produce the CMVC database, which they think is such a trivial task, they want the hard copy documents, too.

THE COURT: What about their request for remote access?

MR. MARRIOTT: Your Honor, the request for remote access is admittedly a new request. I don't think the request lessens the burdens at all. Apparently, unlike counsel, I am not an expert in the CMVC database. The IBM witness who has provided the testimony that she has provided who is an expert doesn't specifically address the remote access. So we don't have sworn testimony. We have the arguments of counsel.

But it is my belief that remote access is not a feasible option for the production of that information. That database consists not only of billions of lines of AIX code, but as counsel acknowledged, it includes codes relating to different products. And I don't believe that that can be managed in a way that imposes much less burden than doing what they otherwise suggest, which is the database be manipulated and the AIX code in which they're interested in be extracted out and copied and provided to them. So I don't believe that's a real solution to that problem, Your Honor.

We're talking about billions of lines of code. There is no, I don't believe, inconsistency between what we've said about how long this code will take. As Ms. Thomas said, we don't know exactly how long that will take. We've not had tutous, Your Honor, so we don't know exactly how long it will take. The best estimates from the people who are acknowledgeable about the database say it will take weeks, likely months to extract out the information from this database and to make it available and that it will occur at a substantial expense. And we don't think in view of the irrelevance of the information and in view of the substantial data that has already been provided that we ought to have to do that.

The fourth reason, Your Honor, why the Court ought not grant this discovery is that, frankly, what this motion

and this request for discovery is about is I think something other than discovery. From the beginning of this case, we have asked SCO to identify that which is publicly touted as the evidence of our misconduct. We asked in motions to compel. SCO declined to provide it. Your Honor ordered SCO to provide it. A year and a half after the litigation was filed and after SCO was touting its claims, they still have not produced any evidence that IBM's Linux activities infringed SCO's alleged copyrights. They still have not identified a single line of the Unix System V code that IBM was alleged to have infringed. SCO has identified only that code which is IBM's own home-grown code which it said to have been infringed. Your Honor, the reason they haven't identified the code that represents the evidence that was supposed to be the predicate for any subsequent production of the graphs of code is because they don't have any. And if I may, Your Honor, approach.

This document, which I will not read because it's marked confidential, unlike the documents of IBM's which were marked confidential which counsel did read, is I think, Your Honor, part of the explanation as to why no evidence has been produced. There is none. SCO has looked. It has attempted to find evidence of alleged infringement, and it has none.

And I'll let Your Honor read this for herself and draw your own conclusions.

(Time lapse.)

THE COURT: I've got the gist.

MR. MARRIOTT: Thank you, your Honor.

The reason that nothing has been disclosed is because there is nothing. And the basis, the reasons for these motions to compel contact information of people that were their founders and the other information that is at issue here is because they want a basis for contending that IBM's motion for summary judgment shouldn't be granted.

Your Honor, consider this. In the footnotes in the briefs submitted to Your Honor and more prominently in the briefs submitted to Judge Kimball, SCO contends that comparison, and Mr. Frei made some reference to it today, that the comparison of one version of Unix and one version of Linux, a couple million lines of code probably in each of those programs, would take, according to SCO's declarant Chris Sontag, 25,000 man years to review. A couple million lines, 25,000 man years.

And yet, Your Honor, what they ask of you purportedly in an effort to streamline things is the production, not only of the 900 million which they already have, but 2-plus billion lines of draft code. How is it possible, conceivable, Your Honor, that the production of billions of lines of additional code will somehow streamline proceedings? It isn't.

And, Your Honor, under their own rationale, their only reasoning as to how they get to 25,000 man years of code to compare these two, it would take 14 billion -- rather 14 million man years to compare the codes. The reason for these requests, Your Honor, is to create a basis for summary judgment -- for avoiding summary judgment that I think is respectfully nonexistent.

The fifth reason, Your Honor, why the Court should not grant SCO the additional billions of lines of code it seeks is because the very information, the very information at issue on these motions today is in front of Judge Kimball, and there is therefore no reason for Your Honor to consider the questions. The only thing that can be gained by Your Honor deciding the questions presented here, which are already in front of Judge Kimball, is a potential inconsistency of result and a duplication of judicial resources. Judge Kimball, as I'll explain, must decide the question. Your Honor, as I'll explain, need not decide the question, and here's why.

IBM submitted, as you know, three motions for summary judgement, a motion for summary judgment on our claim seeking a declaration of non-infringement, which is fully briefed and it's argued. SCO's only real opposition to that motion, Your Honor, was to say, you know, it takes a long time to review this material. We need more time. Give us more time. Without more discovery, we can't possibly respond.

Speaking frankly, the very same discovery here -- there that it seeks here.

With respect to the other two motions, Your Honor, SCO's yet to file its opposition papers, but we've heard a lot about them. We've heard a lot about them today, and we heard a lot about them in the 80-page request SCO made of Judge Kimball to put off our IBM summary judgment motion indefinitely. SCO has made perfectly clear that its opposition to IBM's other motion for summary judgment is going to consist of among other things a Rule 56(f) request for more time on the grounds that it needs the very discovery that it here said that it needs.

So, Your Honor, IBM in considering these -- Judge Kimball, rather, in considering these motions has to resolve the questions. If Your Honor were to agree with SCO and to grant their request today that, IBM, you are required to produce 2 billion-plus lines of code and millions of other lines of code and search the files of hundreds of people, Judge Kimball would still have to consider in the context, for example, of IBM's motion for summary judgment seeking a declaration of non-infringement whether that code matters at all to the claim presented there, whether it's relevant to the claims in the case.

Similarly, if Your Honor agrees with us that SCO ought not be entitled to this code, that it has more than

enough, Judge Kimball is still faced with the Rule 65 application which is pending before them which says this discovery is somehow essential to SCO's case.

By contrast, Your Honor, is Judge Kimball agrees with IBM that if the discovery that's sought here is not relevant to the claims on which IBM's move for summary judgment, then presumably he will grant summary judgment in our favor and effectively moot SCO's claim.

On the other hand, if he decides with SCO that that discovery is essential to the case, we presume he will deny our motions for summary judgment and give them the discovery they need.

He's got to decide the questions, Your Honor. You don't. And we think it makes the most sense to have them decided once and to have them decided on the fuller record where, for example, these papers represent part of the briefing on the summary judgment motion which are, as you can tell, lengthy. And we think that a request for billions of lines of additional discovery shouldn't be predicated on claims that are flawed in our view as a matter of law. SCO disagrees that they're flawed as a matter of law. They can make their arguments to Judge Kimball that they're not. But if they're flawed as a matter of law, they ought not be allowed to get billions of lines of additional discovery.

Your Honor, I have nothing further. SCO's request

for this discovery should be denied. Thank you.

THE COURT: Thank you, Mr. Marriott.

Mr. Eskovitz, we have, let's see, about 10 minutes for rebuttal. First let me ask you a question, however.

MR. ESKOVITZ: Sure.

THE COURT: It is my understanding that SCO has filed yet another amended complaint. Is that correct?

MR. ESKOVITZ: That's correct, Your Honor.

THE COURT: And how does that fit into this?

MR. ESKOVITZ: I'm glad you asked that, Your Honor, because we heard Mr. Marriott generously agree to limit their Ninth Counterclaim to something that clearly doesn't say -- you didn't hear him talk about the text of the Ninth Counterclaim. What you heard was firsthand, personal testimony from the drafter of that, his intent in the language.

THE COURT: I have also heard testimony from non-present witnesses through your submissions.

MR. ESKOVITZ: Correct, Your Honor. The point is our amended complaint seeks to add claims relating, specifically relating to project Monterey. It's the AIX infringement information that we've discovered that I outlined in part for the Court. That is, I submit to Your Honor, the reason why IBM is now offering to magnanimously limit its very broad counterclaim is because it doesn't want that to be the

basis for the discovery that I've explained to the Court, CMVC is at the heart of it.

And secondly, it's going to argue to Judge Kimball, I suggest, that it's not already -- that those claims -- SCO should not be granted leave to amend because those claims are not already in the case because of IBM's new interpretation of its Ninth Counterclaim. You didn't see Mr. Marriott address the language of the counterclaim, which I explained to the Court is patterned exactly after their Tenth Counterclaim.

And the other thing is, Your Honor, there is a board that we have in the notebook, it makes no sense as a matter of law what Mr. Marriott is arguing with respect to this Ninth Counterclaim, because if the Ninth Counterclaim is purely redundant with what's already in the case, then there's no point in bringing it in the first place. The law is clear that redundant counterclaims should be dismissed. Courts regularly dismiss them.

So even if there were some argument based on the tortured reading, which I submit there absolutely isn't, and even if Mr. Marriott didn't have clear reason for this new magnanimous offer to limit based on our drafting the stipulation, the explanation that he gives for that counterclaim makes no sense at all.

So that's exactly how the project Monterey ties in with our request in our complaint. It's a narrow request. It

relates to just project Monterey copyright infringement and AIX, which we submit is already subsumed within their Ninth Counterclaim. It just seeks affirmative relief for the declaratory judgment action that they've already brought.

Mr. Marriott ended on a point that I want to start with, Your Honor. He suggested to this Court that the Court no longer control the discovery in this case. That 19 months into this litigation based on IBM's own submission of premature fact-intensive summary judgment motions, this Court need not and should not consider the discovery issues that have been pending before this Court since at least last November. And he does that just based on the filing of the summary judgment motions that IBM has unilaterally decided to file.

And even worse than that, he doesn't tell the Court what the schedule we're working under is. Judge Kimball gave a fact discovery cutoff of February 11th. We submit that we're already in significant jeopardy under that because we haven't even gotten this basic predicate core discovery. But Mr. Marriott knows that the argument on the summary judgment motions, the two that he alluded to including the contract claims, isn't going to take place until January.

Now, he said, well, if Judge Kimball denies our motions, then SCO will get the discovery. Well, even if Judge Kimball rules from the bench and denies their motions,

you know, presumably in a January hearing, that will give us about a month to work with this very complicated evidence under the current operating discovery schedule. And the point is, Judge Kimball is not controlling discovery in this case just because IBM chooses to file summary judgment motions. Your Honor is in control of discovery, and the argument that IBM has somehow taken aware Your Honor's control of discovery is troubling, to say the least.

Now, you heard Mr. Marriott repeatedly refer to the large numbers of lines of code and the numbers of pages. And I submit to you, Your Honor, none of that matters, because, as Mr. Frei explained, what we're talking about here is 10 compact disks, one hard drive. You can put all of the data on there. And, frankly, Your Honor, it would be insane for us to try to proceed with discovery by going line for line. That's exactly what we're not trying to do. You didn't hear Mr. Marriott talk about the programmer notes and about the audit trail that CMVC and these documents like programmer design documents and programmer comments, which is really at the heart of the discovery we're talking about here, how those things, you didn't hear him say that's excessive. And the point is, those are the guidelines. Those are the road maps.

And Mr. Marriott with respect to the Tenth Counterclaim even called the argument that we need this road map disingenuous and suggested that the road map we're looking

for is like the road map to China. Well, Your Honor, I submit that that is extraordinarily disingenuous because what that ignores is how critical this paper trail is between when they first started developing this product in 1985 until IBM began dumping this product into Linux around the year 2000. And what Mr. Marriott is saying is all we need is the code from 1999 to 2003.

Well, first of all, if the code is already going into Linux, that doesn't give you any information about the history or very little information about the history of what that code is that's going into Linux. It's just not as simple as Mr. Marriott's over simplification has you believe about, put the lines of Unix up here, and put the lines of Unix up there and compare it. You can't do that. It's not practical to do. You can't do a non-literal copyright investigation like that. It would take forever.

And the code that we're talking about here just with respect to the their own Tenth Counterclaim, it's exactly that road map. It's the line that let's you decide what you need to investigate further. And it started in 1985, and, you know, I don't know if it's continuing to this day, but it began at least around the year 2000.

And we have a board on the public statements that IBM has made. This is what IBM said at least the beginning of 2000 about what it was going to do with Linux. It says, we're

going to exploit our expertise in AIX to bring Linux up to par with Unix. This is 2003.

In 2000, and that's one year into the source code that they produced, they said, we're definitely going to use the people that were involved in AIX to help Linux grow. And then IBM's vice-president or former vice-president says, we're willing to open source, any part of AIX to the Linux community, anything that they consider valuable.

Well, Your Honor, we have discovered and we have identified for IBM what we have been able to discover in terms of literal copying from AIX into Unix. What we need is the evidence that will let us investigate non-literal copying and especially for our contract claims the historical evidence that will let us, as Mr. Pfeffer and Mr. Wilson and Mr. Frasure's testimonies explain, the contracts protects. Let us trace those contributions back to show that those contributions and others that undoubtedly will discover with the program history evidence were based on, were derived from, were created with the benefit of exposure to the original licensed product. And that's what this over simplification about, you know, you've got a lot of lines of source code at the end of the road and that's all you need, doesn't work for the Tenth Counterclaim, and it doesn't work for the contract claim.

And, you know, you didn't hear Mr. Marriott talk

about the difference between those two, but it's critical. As Mr. Marriott says, and this is true as a matter of law, that for copyright infringement, we would have to show either literal copying or non-literal copies between the first product and the end product. It doesn't mean that the discovery is not reasonably calculated to lead to admissible evidence. In fact, as we explained, we need that road map to identify that. But that's critically different than what we need to show under the contract claims because the exposure theory and the derivative of the derivative theory doesn't mean you have to compare the first thing to the last thing in order to approve a contracting violation. And that's exactly what that testimony explains.

And if we have the versioning slides.

This is just an illustration for Your Honor of what we're talking about here. It's complicated, but I'll try to get it down to basics. This is the beginning and the end. This is a comparison of the beginning and the end of two versions of just Unix product. This is SCO's Unix product. And the white spots show the difference -- I'm sorry -- show you the things that are similar between the first version and the end version. And you see, it's pretty limited in terms of what's identical in code between the first version and the end version. This is just illustrating. This is where the track changes where it compares the differences.

Now, if you look at the next slide, and this is in the book, if it's easier to see. But what this shows you is the versioning going through all of the development history from the beginning to the very end. And what it shows you is from version to version, there's actually an extraordinary amount of similarities and that the products derive, and this is the way software development works, the products derive from the predecessors. And then they lend to their successors. And you see from version to version, there's a lot of white space. But at the end of the process what is actually literally the same is very limited. And that's what we're trying to show is this versioning process, this program development.

Mr. Frei is pointing out to me that Version 17 had 16 of the 28 lines from Version 1. So it shows very limited literal copying, but a lot of copy-to-copy or version-to-version copying, and that's the kind of paper trail that we're looking for here.

I don't know why Mr. Marriott is talking about contact information. The issue is moot. They produced the contact information we wanted after we filed our renewed motion to compel.

With respect to the Linux documents, I showed you the document where it talks about the Linux Czar and how he sent e-mails, and they haven't produced any of those. There's

serious question about what they've done. Mr. Marriott said he'll look again. I thought that's what they were supposed to be doing in response to the Court's March 3rd order. I think it's the time now respectfully to get affidavits or get at least a description of the process rather than summary assertions of full compliance.

Mr. Marriott in addition to telling the Court that it's given away -- that IBM has taken away the Court's power to deal with the discovery issues has also told the Court that it basically closed the door on this discovery in March because the Court previously denied giving SCO the discovery that we're talking about here. And I showed Your Honor that in March what happened was the Court said, start with this. Do what you can with this, and that's precisely what we've done. And the Court said, I'll consider upon further showing of need ordering more files and more code. And that's what we're here on the renewed -- on the memorandum regarding discovery to do.

Mr. Marriott says that, you know, what we're asking for is the programming contributions of people all over the world, and it's so hard to get. But as Mr. Frei explained, this is all in one central server location, and it all can be downloaded onto 10 compact disks. It's not the paper involved and the billions of lines in code doesn't -- isn't really all that relevant.

What Mr. Marriott is trying to do is put the cart before the horse. He's saying, identify the proof that you have, the further proof that you have before we give you the code that you need in order to develop that proof. And he said, you know, it sounds like we've got a very strong case. And, your Honor, frankly, I believe we do have a strong case. It doesn't mean we're not entitled to take discovery to support our claims and to also defend against their counterclaim.

In arguing that we don't need this discovery because all we have to do is line up the two lines of code, and, again, that's just limited to the copyright infringement issue on the Tenth Counterclaim, IBM is turning the discovery rules on its head. It's saying, here's the least efficient way of going about a copyright investigation. We're going to file a motion for summary judgment. We're not going to give you the discovery that you need to proceed efficiently. And if you can't come up with evidence, then we should be entitled to summary judgment.

But that's not what the discovery rules or, indeed, the federal rules are designed to do. To the contrary, they're designed to give the parties predicate discovery so they can identify who they need to depose. They can take those depositions. They can use the leads from those depositions to pursue further investigation. And then when

all of the facts are discovered and when all of the practicably discoverable facts are discovered, that's when the claims get adjudicated on their merits.

But IBM doesn't want an adjudication on its merits. It wants the district court to consider its summary judgment motions and wants this Court not even to consider the discovery that's so critically relevant to those issues.

With respect to hard copy documents, we have, as we've explained, the CMVC and RCS is purely electronic and readily assessable under the Volocky (sic) case, presents very little burden.

With respect to hard copy documents, IBM has taken the position that they wouldn't even meet and confer with us with respect to documents like design documents and white papers relevant to our discovery claims. I don't know what's there electronically. I suspect a lot of it is maintained electronically and is readily available. But IBM has put us in a position of basically, you know, having no knowledge about it because they won't even meet to confer on the issue. They just say it's irrelevant.

Mr. Marriott says remote access is a new issue and he's never heard about this and he didn't really know. Well, the truth is that we submitted first of all in the declaration of Barbara Howe, which is before the Court in Paragraph 14, she explained that remote access is available. IBM's own

internal documents tout the fact that remote access is available. And what Barbara Howe explained was that remote access was, in fact, what they gave SCO during the project Monterey project, SCO had access to limited portions of the source tree within CMVC. So this is nothing new, and it is certainly nothing exceptional.

Mr. Marriott brought out to the Court this Swartz report. This a confidential document that he handed up to the Court. I just wanted to say a couple things about that.

First of all, the Swartz report was prepared in 1999. That was while the Linux Kernel was less than half its size of what it is now and before --

THE COURT: It says 2002.

MR. ESKOVITZ: That's an e-mail reflecting or purporting to reflect what the report said. And we have the report itself.

THE COURT: That's fine.

MR. ESKOVITZ: And it's available. It was argued to the Court, to Judge Kimball, and it's in the transcript.

This is before IBM's contributions to Linux. And actually the Swartz report is exactly what we're saying here in terms of why we need this discovery. What Swartz said was, I tried to investigate literal copying. I need more leads in order to investigate non-literal copies. He said --

THE COURT: I'm going to stop you there. If these

are intended to be confidential, I think the contents should be confidential, and Mr. Marriott did not refer to the contents. I've read it.

MR. ESKOVITZ: Understood, Your Honor. We actually submitted this to the Court and waived our confidentiality with respect to this document, in order to clarify the record, in a very similar circumstance before Judge Kimball. But in any event, we can submit this document to the Court for your in camera review.

The bottom line here is that the discovery we're seeking imposes very little burden on IBM. This is, the CMVC program is a program that they use in their everyday business. They are a very sophisticated computer technology company. If it had all the problems of extracting irrelevant code or irrelevant sections that IBM wants the Court to believe, IBM wouldn't be able to get its work done. It is just not conceivable that this is such an impractical and difficult to use program.

And even if you take everything they say at face value, their view is it will take weeks, not many months, not, you know, months, and months and months, as Mr. Marriott said that and repeated again in his argument here, just a matter of weeks. And given how critically relevant this discovery is to our contract claim and to their Ninth Counterclaim and their Tenth Counterclaim, there is just no conceivable justification

to withhold this discovery.

THE COURT: You've got a minute.

MR. ESKOVITZ: IBM wants to withhold this discovery for the exact same reason why we want it, and that's because without it, we can't get to trial on the merits of this claim. I mean, why else would IBM had told the Court it takes many months when it just takes weeks? Why else would IBM have told Judge Kimball that this evidence is relevant to the contract claims and not the copyright claims when that was being argued and now tell this Court it is not relevant to the contract claims, either? Why else would IBM tell the Court that CMVC really doesn't function the way all of its publicly available information says it does and common sense dictates? Why would IBM assert an unambiguously broad counterclaim and then try to impose this new gloss based on testimony of Mr. Marriott about what he intended only in response to evidence that disproves that claim and that shows our entitlement to further discovery to disprove it?

And why else would IBM take the position that by simply asking for core predicate discovery, the kind of discovery that is produced early on in every software case that SCO is simply just trying to drag out and delay the proceedings?

To the contrary, Your Honor, we want this discovery so we can move ahead, so we can take the depositions, so we

can identify who among the 7,000 people they have listed for us we need to depose and so we can get to a trial on the merits of this case.

THE COURT: Thank you, Mr. Eskovitz.

Mr. Marriott, do you want to respond?

MR. MARRIOTT: Just briefly, Your Honor.

Counsel suggests that it was conceded in front of Judge Kimball that the discovery requested here is relevant to the contract claims. That is not true, and the transcripts, Your Honor, I think bears that out.

Counsel makes much of the notion that all of this historical code is required if they are to prove their case, and how could we have not produced all of the historical code? Your Honor, the same historical code exists with respect to the SCO product in this case. Not a single line of it has been produced to IBM.

They purport to be the copyright owners of the Unix operating system. If IBM is supposed to be holding back the most important discovery in the case, why do we not have the very same discovery from the SCO?

You again heard counsel testify about the CMVC. I don't purport to be an expert in the CMVC database, Your Honor. Those who do have submitted sworn testimony telling you what is required, that it's a complicated and involved process. I take them at their word. I don't take counsel's

argument that a day or two at most are required for the production of that information. There's no evidence in the record to support that.

The notion of remote access is new, Your Honor. It is new in the supplemental memorandum submitted by them in this matter. That to me is new. A memorandum outside of the ordinary course of the proceedings. And it isn't a simple matter to provide remote access to that code. Giving access remotely to code is part of a joint development project where the access being provided is very limited. It's very different from provided access to historical code that concerns a period of approximately 20 years and is written by thousands of individuals.

Your Honor, they make much of the motion of this paper trail and how they have to figure out which line changed from this version to that version and this version to the next version. The copyright law, Your Honor, with respect to that claim makes that entirely irrelevant. It does not matter. If at the end of the day Linux is not substantially similar to Unix, it matters not, how it is that Linux came to look like it does and how Unix came to look like it does. The notion that they need to dig into the paper trail to figure out what actually happened here is a red herring.

Counsel talks about the scheduling and suggests I think that I'm somehow misleading Your Honor into believing

that they will get this discovery and have no time to do anything with it. SCO asked Judge Kimball, Your Honor, to change the schedule. They said they needed a status conference to change the order of proceedings because IBM shouldn't be allowed there to proceed with summary judgment motion. There is something improper about that, counsel suggests.

Judge Kimball denied their request to deny IBM the right to proceed with its summary judgment motions and to hold a status conference addressing the concerns counsel had expressed. Judge Kimball said that if SCO has issues with respect to the discovery as it relates to IBM summary judgment motion, then SCO can make those part of the Rule 56(f) application.

Your Honor, I don't believe I said, and I certainly don't believe that our suggestion that it makes more sense to have Judge Kimball consider these questions as they're raised on the summary judgment motions is in any way an indication that IBM does not recognize who is in charge of these proceedings. We understand it is Your Honor. And I don't believe that's what I said, and I don't believe that counsel accurately reconstructs my argument.

The contact information, Your Honor, is relevant to the case. Why do I raise it? Because they haven't given us the very information they made a big deal about our not giving

them. That's why I raised the issue. It is not entirely a moot point. What is moot is their request of us.

The Ninth Counterclaim, Your Honor, we don't believe there is any basis less the record be in any way unclear to their contentions with respect to the Ninth Counterclaim. I'm not going to walk the Court through in detail why it is we believe the claim they wish to bring before copyright infringement is meritorious. We think the claim is without merit. If they want to bring the claim, they obviously do, they can file a motion as they have with Judge Kimball seeking leave to proceed on that claim. If Judge Kimball grants their motion, it will be in the case, and they can proceed with respect to discovery on that claim. What they're effectively asking Your Honor to do is to give them discovery with respect to a claim that is not in the case, with respect to a counterclaim which is suggested that counsel for IBM, me, is somehow improperly misconstruing today in an effort to avoid something.

The claim was intended as I described. We're perfecting happy to stipulate to it. It sounds to me like SCO doesn't want the claim to be removed from the case for its own strategic advantage.

Your Honor, I thought I heard counsel say that they are not seeking information in hard copy from the files of thousands of IBM developers. That's news to me. And if they

aren't, then that makes it a simpler question for the Court. It is only about the CMVC.

But the suggestion that we didn't meet and confer with them is flatly wrong. Mr. Eskovitz shows up, Your Honor, today for the first time. I have spoke to his partner Bob Silver about this very issue, and we reached clearly an impasse on that point. So the notion that we haven't met to confer is simply factually wrong.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Marriott.

Well, you did that. Counsel, I'm going to do three things at this time. First, I'm going to require that the parties prepare and exchange privilege logs within 30 days reciprocally. I'm also going to, Mr. Marriott, require that within 30 days that you provide to SCO affidavits from those individuals in management, Mr. Palmisano and Mr. Wladawsky-Berger, concerning what may exist within their files. Also affidavits regarding the board of directors information. And thirdly, I'm going to take the remainder of this argument under advisement.

Anything further?

MR. MARRIOTT: Thank you, Your Honor.

MR. ESKOVITZ: Thank you, Your Honor.

THE COURT: And gentlemen, thank you for a well-presented and well-argued positions.

MR. MARRIOTT: Thank you, Your Honor.

MR. HATCH: Your Honor, one thing. There's one affidavit that would probably be included in your order.

(Discussion off the record between co-counsel.)

MR. ESKOVITZ: I think we're okay, Your Honor.

MR. MARRIOTT: May I just inquire? This affidavit exchange, is that to be reciprocal with respect to SCO, as well?

MR. ESKOVITZ: Your Honor, if I can just address that quickly. Mr. Marriott in his argument has raised a lot of issues about SCO discovery that they've never submitted as arguments to the Court in any kind of motion.

MR. HATCH: There's no motion.

MR. ESKOVITZ: There's no motion.

THE COURT: That was my concern, Mr. Marriott, that it's not the subject of a motion. So at this time, no. But we'll leave that issue --

MR. MARRIOTT: We can bring a motion, if you'd like.

THE COURT: All right. Thank you.

MR. MARRIOTT: Thank you.

THE COURT: And I understand the position of the parties on that. I don't know that it will be necessary to have a hearing on it.

MR. MARRIOTT: Thank you.

THE COURT: Thank you. We're in formal recess.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH )

) ss.

COUNTY OF SALT LAKE )

I, KELLY BROWN HICKEN, do hereby certify that I am a certified court reporter for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter on October 19, 2004, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number from 3 through 86 constitute a full, true and correct report of the same.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal, this 26th day of October 2004.

KELLY BROWN HICKEN, CSR, RPR, RMR

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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF SAMUEL J. PALMISANO**

**FILED UNDER SEAL**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, Samuel J. Palmisano, declare as follows:

1. I am the Chief Executive Officer and Chairman of the Board of Directors of International Business Machines Corporation ("IBM").

2. This declaration is submitted in connection with the lawsuit brought by The SCO Group, Inc. ("SCO") against IBM, titled The SCO Group, Inc. v. International Business Machines Corporation, Civil No. 2:03CV-0294 DAK (D. Utah 2003). I make this declaration based upon personal knowledge.

3. I allowed attorneys from IBM and Cravath, Swaine & Moore LLP to have unrestricted access to all of the documents in my possession or control, including hard copy documents, soft copy documents, and e-mails.

4. On February 18, 2004, two attorneys, and on February 19, 2004, one attorney, came to my office in Armonk, New York, and searched through my files for documents responsive to SCO's discovery requests. I did not withhold any documents from the attorneys' review.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed: November 18, 2004.

Armonk, New York

Samuel J. Palmisano

**CERTIFICATE OF SERVICE**

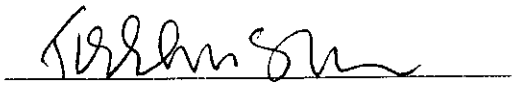
I hereby certify that on the 19th day of November, 2004, a true and correct copy of the foregoing was hand delivered to the following:

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

and was sent by U.S. Mail, postage prepaid, to the following:

Stephen N. Zack
Mark J. Heise
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

Robert Silver
Edward Normand
Sean Eskovitz
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504



SNELL & WILMER L.L.P.
Alan L. Sullivan (3152)
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CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler (admitted pro hac vice)
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Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

*Attorneys for Defendant/Counterclaim-Plaintiff International Business Machines Corporation*

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF IRVING WLADAWSKY-BERGER**

**FILED UNDER SEAL**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, Irving Wladawsky-Berger, declare as follows:

1. I am currently employed by International Business Machines Corporation ("IBM") as Vice President, Technical Strategy and Innovation.

2. This declaration is submitted in connection with the lawsuit brought by The SCO Group, Inc. ("SCO") against IBM, titled The SCO Group, Inc. v. International Business Machines Corporation, Civil No. 2:03CV-0294 DAK (D. Utah 2003). I make this declaration based upon personal knowledge.

3. On August 12, 2003, I met with counsel for IBM for the purpose of providing all documents in my possession that were responsive to SCO's document requests. The attorneys discussed with me in detail each of the categories of documents sought by SCO through its document requests.

4. During this meeting, I, with help from my administrative assistant, identified the documents in my possession (in both hard copy or electronic form) that I believed might be responsive to the document requests. We subsequently searched for, located and forwarded all of those documents to IBM's Corporate Litigation department in White Plains, New York.

5. I understand that further review by attorneys for IBM determined that none of the documents I provided were responsive to any of SCO's document requests.

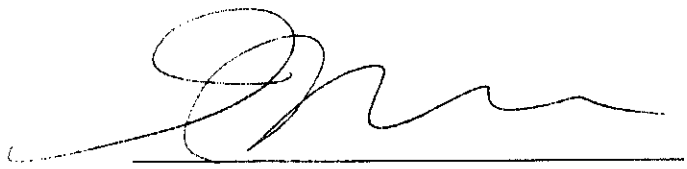
6. Subsequently, in both February 2004 and March 2004, my assistant and I searched again for documents that were responsive to additional document requests from SCO, as well as the March 3, 2003 Order of this Court. We did not find any additional responsive documents.

7. On October 29, 2004, I met again with several attorneys representing IBM in this litigation. During that meeting, I recalled the existence of two folders of electronic documents on my computer that I may have overlooked in our prior searches for relevant documents. I gave to the attorneys CDs containing copies of all of the documents in the two folders. I understand that the attorneys have determined that some of the documents I recently provided are responsive to some of SCO's document requests, and that the attorneys will be producing those documents to SCO.

8. I declare under penalty of perjury that the foregoing is true and correct.

Executed: November 17, 2004.

Somers, New York



Irving Wladawsky-Berger

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of November, 2004, a true and correct copy of the foregoing was hand delivered to the following:

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

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Miami, Florida 33131

Robert Silver
Edward Normand
Sean Eskovitz
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

I

SNELL & WILMER L.L.P.
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Facsimile: (212) 474-3700

*Attorneys for Defendant/Counterclaim-Plaintiff International Business Machines Corporation*

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF ANDREW BONZANI**

**FILED UNDER SEAL**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, Andrew Bonzani, declare as follows:

1. I am currently employed by International Business Machines Corporation ("IBM") as Assistant Secretary and Associate General Counsel.

2. This declaration is submitted in connection with the lawsuit brought by The SCO Group, Inc. ("SCO") against IBM, titled The SCO Group, Inc. v. International Business Machines Corporation, Civil No. 2:03CV-0294 DAK (D. Utah 2003). I make this declaration based upon personal knowledge.

3. As Assistant Secretary, I am responsible for overseeing and maintaining the files with respect to the meetings of the IBM Board of Directors, including materials delivered or presented to the Board.

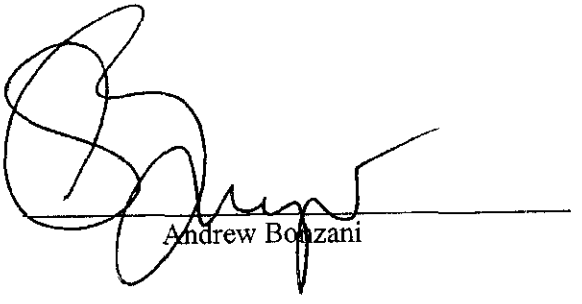
4. IBM maintains files for all such materials and members of the Board are not required to maintain or preserve their own copies of such materials. At the end of each meeting of the Board of Directors, the materials for that Board meeting are left behind for collection by members of the Secretary's staff.

5. In March 2004, I and persons under my direction conducted a full and complete search of the Board's files for documents responsive to SCO's document requests. We turned over all such documents that we believed to be responsive to our outside counsel at Cravath, Swaine & Moore LLP for their review. I understand that all responsive, non-privileged documents from the Board files have been produced to SCO.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed: November __, 2004.

Armonk, New York



Andrew Bonzani

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of November, 2004, a true and correct copy of the foregoing was hand delivered to the following:

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Mark F. James
HATCH, JAMES & DODGE, P.C.
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*Attorneys for Defendant/Counterclaim-Plaintiff*
*International Business Machines Corporation*

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF ALEC S. BERMAN**

**FILED UNDER SEAL**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, Alec S. Berman, declare as follows:

1. I am currently employed by International Business Machines Corporation ("IBM") as Associate General Counsel—Corporate Litigation.

2. This declaration is submitted in connection with the lawsuit brought by The SCO Group, Inc. ("SCO") against IBM, titled The SCO Group, Inc. v. International Business Machines Corporation, Civil No. 2:03CV-0294 DAK (D. Utah 2003). I make this declaration based upon personal knowledge.

3. On February 18, 2004, Peter Ligh, an attorney from Cravath, Swaine & Moore LLP ("Cravath"), and I visited the office of Samuel Palmisano in Armonk, New York. Mr. Ligh and I performed a thorough search of Mr. Palmisano's files. We reviewed Mr. Palmisano's documents (including his e-mails), and selected all documents that were potentially responsive to SCO's document requests for copying and further review.

4. On February 19, 2004, I returned to Mr. Palmisano's office to review files in two additional file drawers that had been inadvertently overlooked on our visit the day before. I again selected all documents that were potentially responsive for copying and further review.

5. After copies were made of Mr. Palmisano's potentially responsive documents, attorneys from Cravath reviewed those documents for responsiveness and privilege. I understand that more than 1,000 pages of Mr. Palmisano's documents were determined to be responsive and non-privileged and have been produced to SCO.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed: November 15, 2004.

White Plains, New York

Alec S. Berman

Alec S. Berman

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of November, 2004, a true and correct copy of the foregoing was hand delivered to the following:

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

and was sent by U.S. Mail, postage prepaid, to the following:

Stephen N. Zack
Mark J. Heise
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

Robert Silver
Edward Normand
Sean Eskovitz
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

PLEASE TAKE NOTICE that pursuant to Rules 26 and 30(b)(6) of the Federal Rules of Civil Procedure, counsel for plaintiff/counterclaim-defendant The SCO Group, Inc. ("SCO") will take the deposition upon oral examination of defendant/counterclaim-plaintiff International Business Machines Corporations ("IBM"), on December 15, 2004, beginning at 9:00 a.m. This deposition will be taken at the offices of SCO's counsel Boies, Schiller & Flexner LLP, 333 Main Street, Armonk, New York, and will be taken pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure.

IBM is directed, pursuant to Fed. R. Civ. P. 30(b)(6), to designate one or more officers, directors, managing agents or other person(s) who consent to testify on its behalf concerning matters known or reasonably available to IBM, concerning the topics specified below. The deposition will be taken before a Notary Public authorized by law to administer an oath and will continue from day-to-day until completed. The deposition will be recorded by stenographic and videotape means.

SCO hereby incorporates all instructions, definitions and rules contained in Rules 30 and 34 of the Federal Rules of Civil Procedure, SCO's First Request for Production of Documents and First Set of Interrogatories (June 23, 2003), and the local rules or individual practices of this Court, and supplements them as follows:

As used herein the term "UNIX Software Product" refers to the entire contents of any licensed UNIX product, including all intellectual property, source code, structures, sequences, organization, ideas, methods and concepts therein; and the entire contents of any software product(s) based (in whole or in part) on, derived or modified from, or created through exposure to, the original licensed UNIX product.

DATED this 30th day of November, 2004.

Edward Normand /@

BOIES, SCHILLER & FLEXNER LLP
Robert Silver (admitted pro hac vice)
Stephen N. Zack (admitted pro hac vice)
Edward Normand (admitted pro hac vice)
Sean Eskovitz (admitted pro hac vice)

*Attorneys for The SCO Group, Inc.*

**TOPICS FOR DEPOSITION**

1. The extent to and manner in which UNIX Software Products were used, directly or indirectly, in the creation, derivation, or modification of any source code that IBM contributed to Linux, including, but not limited to, the following:
    a. The date and nature of IBM's contributions of source code from AIX or Dynix, whether copied in a literal or non-literal manner, to Linux;
    b. IBM's and Sequent's use of structures, sequences, organization, ideas, methods or concepts contained within any UNIX Software Product in developing source code that IBM contributed to Linux; and
    c. The identity of the programmers who were exposed to any UNIX Software Product.
2. Identification of and role of IBM employees or contractors involved in the work responsive to Topic 1 above.
3. Identification of the steps taken by corporate representative witness to be able to respond fully and accurately to Topics 1 and 2 above, including, but not limited to, documents reviewed, persons consulted, and databases consulted.
4. Nature of information maintained in IBM's Configuration Management Version Control ("CMVC") System, specifically with respect to AIX.
5. All actions, measures, or safeguards taken or considered by IBM related to the protection of UNIX Software Products subject to license agreements between AT&T and IBM.

6. All actions, measures, or safeguards taken by or considered by IBM in connection with the development of AIX to ensure compliance with the protection of UNIX Software Products under license agreements between AT&T and IBM.
7. All actions, measures, or safeguards taken by or considered by IBM in connection with contributions made by IBM to Linux to ensure compliance with the protection of UNIX Software Products under license agreements between AT&T and IBM.
8. Topics 1 through 7 above, with respect to conduct by Sequent, license agreements between AT&T and Sequent, Dynix code, and Revision Control System ("RCS") for Dynix.
9. All agreements entered into by IBM concerning IBM's intent to contribute source code to Linux from AIX and/or Dynix, and/or IBM's contribution of such source code to Linux.
10. IBM's consideration, discussion, or analysis of the source code that IBM decided to contribute to Linux and IBM's reasons for contributing that code to Linux.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing

**PLAINTIFF/COUNTERCLAIM-DEFENDANT SCO'S NOTICES OF 30(b)(6) DEPOSITION** to be served on this 30th day of November, 2004, to the following:

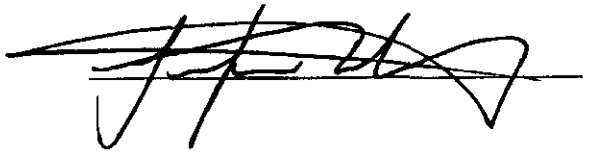
By Hand Delivery –

David R. Marriott, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York. New York 10019
Tel: 212-474-1000
Fax: 212-474-3700

And by U.S. Mail, first class postage prepaid –

Alan L. Sullivan, Esq.
Todd M. Shaughnessy, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Ste. 1200
Gateway Tower West
Salt Lake City, Utah 84101
Tel: 801-257-1900
Fax: 801-257-1800

Donald J. Rosenberg, Esq.
1133 Westchester Avenue
White Plains, New York 10604



Brent O. Hatch (5715)
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Bank of America Tower – Suite 2800
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Miami, Florida 33131
Telephone: (305) 539-8400
Facsimile: (305) 539-1307

*Attorneys for The SCO Group, Inc.*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

| | |
|---|---|
| THE SCO GROUP, INC.,<br><br>Plaintiff/Counterclaim-Defendant,<br><br>v.<br><br>INTERNATIONAL BUSINESS MACHINES CORPORATION,<br><br>Defendant/Counterclaim-Plaintiff. | **PLAINTIFF/COUNTERCLAIM-DEFENDANT SCO'S AMENDED NOTICE OF 30(b)(6) DEPOSITION**<br><br>Case No. 2:03CV0294DAK<br>Honorable Dale A. Kimball<br>Magistrate Judge Brooke C. Wells |

PLEASE TAKE NOTICE that pursuant to Rules 26 and 30(b)(6) of the Federal Rules of Civil Procedure, counsel for plaintiff/counterclaim-defendant The SCO Group, Inc. ("SCO") will take the deposition upon oral examination of defendant/counterclaim-plaintiff International Business Machines Corporations ("IBM"), on December 16, 2004, beginning at 9:00 a.m. This deposition will be taken at the offices of SCO's counsel Boies, Schiller & Flexner LLP, 333 Main Street, Armonk, New York, and will be taken pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure.

IBM is directed, pursuant to Fed. R. Civ. P. 30(b)(6), to designate one or more officers, directors, managing agents or other person(s) who consent to testify on its behalf concerning matters known or reasonably available to IBM, concerning the topics specified below. The deposition will be taken before a Notary Public authorized by law to administer an oath and will continue from day-to-day until completed. The deposition will be recorded by stenographic and videotape means.

SCO hereby incorporates all instructions, definitions and rules contained in Rules 30 and 34 of the Federal Rules of Civil Procedure, SCO's First Request for Production of Documents and First Set of Interrogatories (June 23, 2003), and the local rules or individual practices of this Court, and supplements them as follows:

As used herein the term "UNIX Software Product" refers to the entire contents of any licensed UNIX product, including all intellectual property, source code, structures, sequences, organization, ideas, methods and concepts therein; and the entire contents of any software product(s) based (in whole or in part) on, derived or modified from, or created through exposure to, the original licensed UNIX product.

DATED this 2nd day of December, 2004.

Sean Eskovitz

BOIES, SCHILLER & FLEXNER LLP
Robert Silver (admitted pro hac vice)
Stephen N. Zack (admitted pro hac vice)
Edward Normand (admitted pro hac vice)
Sean Eskovitz (admitted pro hac vice)

*Attorneys for The SCO Group, Inc.*

**TOPICS FOR DEPOSITION**

1. The negotiation and execution of all license agreements between IBM and AT&T regarding any UNIX Software Product, and any and all amendments or modifications thereto.
2. IBM's interpretation of the restrictions regarding use of UNIX Software Products contained in all license agreements relating to such products, and any and all amendments thereto.
3. Consideration and discussion concerning UNIX licensing rights, limitations, and potential liabilities, in connection with IBM's acquisition of Sequent.
4. All communications with Novell, Inc. ("Novell") relating to SCO and/or any of its predecessor entities, including, but not limited to, communications relating to the Asset Purchase Agreement between Novell and the Santa Cruz Operation, Inc., and any amendments thereto.
5. IBM's decision to pursue its Linux-related business, including, but not limited to, any assessments of (a) IBM's ability to contribute to Linux in compliance with its contractual obligations regarding UNIX Software Products; (b) the effect on UNIX and UNIX-related products of supporting Linux; (c) the importance of IBM support to making Linux successful as an operating system for large businesses; and (d) the manner(s) in which IBM would recoup its investment in contributing to and promoting Linux.
6. All measures, actions, and efforts taken by IBM to access, obtain, or download computer files and/or code from SCO's website, including, without limitation, the materials identified in the Declaration of Kathleen Bennett that IBM submitted in

support of its motion for summary judgment on SCO's breach-of-contract claims and the Declaration of Kathleen Bennett that IBM submitted in support of its motion for summary judgment on its counterclaim for copyright infringement (Eighth Counterclaim).

7. Identification of all individual(s) (by name, position, particular responsibility, and current location) who were principally responsible for (1) the programming development of AIX and Dynix (including Dynix/ptx); and (2) the programming development of Linux using, in any manner whatsoever, materials from those programs. This request includes, without limitation, identification of all relevant chief technology officers, chief software architects, and chief software engineers.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PLAINTIFF/COUNTERCLAIM-DEFENDANT SCO'S AMENDED NOTICE OF 30(b)(6) DEPOSITION was served on Defendant International Business Machines Corporation on December 2, 2004, by hand delivery and U.S. Mail to:

David R. Marriott, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

And U.S. Mail to:

Alan L. Sullivan, Esq.
Todd Shaughnessy, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Ste. 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

Donald J. Rosenberg, Esq.
1133 Westchester Avenue
White Plains, New York 10604

BOIES, SCHILLER & FLEXNER LLP

By: Sean Eskovitz
Robert Silver
Edward Normand
Sean Eskovitz

HATCH, JAMES & DODGE
Brent O. Hatch

Attorneys for The SCO Group, Inc.

FAX DEPT.
04 DEC 10 PM 6:56

**CRAVATH, SWAINE & MOORE LLP**
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Fax: (212) 474-3700

29809

Date: December 10, 2004

| Name/Firm | | Fax No. | Phone No. |
|---|---|---|---|
| To: Edward Normand, Esq.<br>Boies, Schiller & Flexner LLP | | (914) 749-8300 | (914) 749-8200 |
| From: Christopher Kao/4752 | Room: 3914W | (212) 474-3700 | (212) 474-1342 |

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Message:



Reference No. 02281-293

CRAVATH, SWAINE & MOORE LLP

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CITYPOINT
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LONDON EC2Y 9HR
TELEPHONE: 44-20-7453-1000
FACSIMILE: 44-20-7860-1150

WRITER'S DIRECT DIAL NUMBER

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GREGORY M. SHAW
PETER S. WILSON
JAMES C. VARDELL, III
ROBERT H. BARON
KEVIN J. GREHAN
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STEPHEN S. MADSEN
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SUSAN WEBSTER
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ROWAN D. WILSON
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PAUL MICHALSKI
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RICHARD HALL
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JULIE A. NORTH
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KATHERINE B. FORREST
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WILLIAM V. FOGG
FAIZA J. SAEED
RICHARD J. STARK
THOMAS E. DUNN
JULIE SPELLMAN SWEET
RONALD CAMI
MARK I. GREENE

SARKIS JEBEJIAN
JAMES C. WOOLERY
DAVID R. MARRIOTT
MICHAEL A. PASKIN
ANDREW J. PITTS
MICHAEL T. REYNOLDS
ANTONY L. RYAN
GEORGE E. ZOBITZ
GEORGE A. STEPHANAKIS
DARIN P. MCATEE

SPECIAL COUNSEL
SAMUEL C. BUTLER
THOMAS D. BARR

OF COUNSEL
ROBERT ROSENMAN
CHRISTINE BESHAR

December 10, 2004

SCO v. IBM; IBM v. SCO

Dear Ed:

I write in response to the 30(b)(6) notices served by SCO on November 30, 2004 (the "First Notice") and December 2, 2004 (the "Second Notice"). This letter sets forth IBM's responses and objections to SCO's notices and incorporates by reference IBM's General Objections set forth in IBM's response to SCO's first set of interrogatories and document requests.

First Notice

Topic 1. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad and unduly burdensome. IBM further objects to this topic as it seeks discovery more appropriately sought by other means. Please let us know if you would like IBM to treat this request as an interrogatory.

Topic 2. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad and unduly burdensome. IBM further objects to this topic as it seeks discovery more appropriately sought through interrogatories. Please let us know if you would like IBM to treat this request as an interrogatory.

Topic 3. As Topic 3 relates entirely to Topics 1 and 2, IBM will not produce a witness on Topic 3.

Topic 4. IBM objects to this topic on the grounds that it is overbroad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to admissible evidence, particularly to the extent it relates to programs other than AIX. Subject to, as limited by, and without waiving its objections, IBM will produce

Joan Thomas to testify as to the nature of information concerning AIX maintained in IBM's CMVC system.

Topic 5. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad and unduly burdensome. Subject to, as limited by, and without waiving its objections, IBM will produce Joan Thomas to testify as to actions, measures or safeguards taken by IBM related to the protection of code obtained from AT&T pursuant to license agreements between AT&T and IBM.

Topic 6. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad and unduly burdensome. Subject to, as limited by, and without waiving its objections, IBM will produce Joan Thomas to testify as to actions, measures or safeguards taken by IBM related to the protection of code obtained from AT&T pursuant to license agreements between AT&T and IBM.

Topic 7. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad and unduly burdensome. Subject to, as limited by, and without waiving its objections, IBM will produce Joan Thomas to testify as to actions, measures or safeguards taken by IBM related to the protection of code obtained from AT&T pursuant to license agreements between AT&T and IBM.

Topic 8. IBM restates its objections to Topics 1 through 7 above. IBM will produce Scott Nelson to testify to the nature of information concerning Dynix maintained in Sequent's RCS system. IBM will also produce Scott Nelson to testify as to actions, measures or safeguards taken by Sequent related to the protection of code obtained from AT&T pursuant to license agreements between AT&T and Sequent.

Topic 9. IBM objects to this topic on the grounds that it vague, ambiguous and seeks discovery more appropriately sought by other means. Subject to, as limited by, and without waiving its objections, IBM will produce Daniel Frye to testify as to agreements, if any, entered into by IBM concerning IBM's contribution of source code to Linux from AIX and/or Dynix.

Topic 10. IBM objects to this topic on the grounds that it is overbroad, unduly burdensome, seeks discovery more appropriately sought by other means, and seeks information that is duplicative and cumulative of information already produced by IBM in response to SCO's discovery requests. Subject to, as limited by, and without waiving its objections, IBM will produce Daniel Frye to testify as to the factors generally considered, discussed or analyzed by IBM before deciding to contribute any source code to Linux. IBM cannot, and will not, produce a witness to testify concerning the specific consideration, discussion or analysis of each and every contribution IBM has ever made to Linux.

Second Notice

Topic 1. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to admissible evidence. IBM further objects to this topic on the grounds that it seeks discovery more appropriately sought by other means. IBM further objects to this topic on the grounds that it seeks information duplicative and cumulative of testimony that has been, or will be, provided to SCO.

Topic 2. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to admissible evidence. IBM further objects to this topic as it seeks discovery more appropriately sought by other means. IBM further objects to this topic on the grounds that it is duplicative and cumulative of testimony that has been, or will be, provided to SCO.

Topic 3. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to admissible evidence. IBM further objects to this topic on the grounds that it calls for legal conclusions and information protected by the attorney-client privilege.

Topic 4. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to admissible evidence and information. IBM further objects to this topic on the grounds that it seeks discovery more appropriately sought by other means. IBM further objects to this topic on the grounds that it is duplicative and cumulative of information already produced by IBM in response to SCO's discovery requests.

Topic 5. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad and unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to admissible evidence. IBM further objects to subpart (a) of this topic on the grounds that it calls for legal conclusions and information protected by the attorney-client privilege. Subject to, as limited by, and without waiving its objections, IBM will produce Daniel Frye to testify as to Topic 5(b), (c) and (d).

Topic 6. IBM objects to this topic on the grounds that it is overbroad and unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to admissible evidence. IBM further objects to this topic on the grounds that it seeks information that is duplicative and cumulative of information already provided to SCO. Subject to, as limited by, and without waiving its objections, IBM will produce Kathleen Bennett to testify as to the measures, actions and efforts taken by IBM to access, obtain or download code from SCO's website as described in the Declaration of Kathleen Bennett submitted in support of IBM's Motion for Partial Summary Judgment on SCO's Contract Claims and the Declaration of Kathleen Bennett submitted in support of IBM's Motion for Partial Summary Judgment on IBM's Eighth Counterclaim.

Topic 7. IBM objects to this topic on the grounds that it is vague, ambiguous, overbroad and unduly burdensome. IBM further objects to this topic on the grounds that it seeks information that is duplicative and cumulative of information already provided by IBM in response to SCO's discovery requests.

The witnesses identified herein are not available to be deposed on December 15, 2004 and December 16, 2004 as proposed by SCO. We are inquiring into their schedules and will provide you with alternate dates as soon as possible.

Please feel free to call me if you have any questions.

Sincerely,

Christopher Kao

Edward Normand, Esq.
Boies, Schiller & Flexner LLP
333 Main Street
Armonk, NY 10504

VIA FACSIMILE

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December 14, 2004

By Facsimile and First Class Mail
Amy Sorensen, Esq.
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Salt Lake City, Utah 84101

Re: SCO v. IBM, Case No. 2:03CV-0294 DAK

Dear Amy:

This is to confirm my understanding from our conversation yesterday morning that counsel for IBM has undertaken to obtain deposition dates in early January for the witnesses IBM has agreed to produce in response to the notices of deposition pursuant to Rule 30(b)(6) that SCO served on November 30 and December 2, 2004. In consideration of that undertaking, SCO agrees to postpone those depositions from their originally scheduled dates of December 15 and 16, 2004.

Sincerely,

Edward Normand